Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as Amended by	)	**MB Docket No. 05-311**
the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

REPLY COMMENTS OF
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This proceeding provides the opportunity to ensure that both incumbent cable operators and new entrants can compete under the same terms and conditions. Emerging competition between cable operators and telecommunications carriers led the Commission in 2007 to set limits on fees and "in-kind" compensation (such as traffic light control systems) that Local Franchise Authorities (LFAs) could require of new entrants in order to encourage investment by potential competitors. Shortly thereafter, the Commission set similar limits with respect to incumbents so that regulation does not confer a competitive advantage on a subset of market participants. The Court of Appeals for the Sixth Circuit upheld the protectionss for new entrants in the 2008 *Alliance* decision, but remanded some of the protections for incumbents in the 2015 *Montgomery County* decision so the Commission can clarify several matters.

Limits on franchise fees and in-kind contributions are necessary due to a long and unfortunate history of abuse of the cable franchise process by local governments that has required both Congressional and Commission intervention on numerous occasions. Historically, many localities awarded an exclusive franchise—a legally sanctioned monopoly—for cable television service to the highest bidder. Since competitors couldn't enter the market because competition was illegal, consumers were turned into captive ratepayers. Close supervision of the cable operator(s) by an LFA was justified in case the cable operator might be tempted to charge excessive rates or provide substandard service. But nothing prevented excessive rates or substandard service as a result of the local franchising process itself. Winning a local franchise and obtaining periodic renewals in many cases required cable operators to build playgrounds, libraries, firehouses and sewer systems, not to mention make payoffs to influential citizens and recover the cost from their captive ratepayers.[1] The local franchise process itself in many cases increased the cost of cable service and reduced capital investment. Congress regulated franchise fees and reduced onerous regulation in 1984. Investment increased, and programming became more abundant.

By 1992, consumer outrage over cable prices and the quality of cable service led Congress to provide for cable price regulation over the President's veto. Congress also outlawed exclusive franchises and forbade local officials from unreasonably refusing to award additional franchises to potential competitors. Investment decreased dramatically, while prices stayed about the same. In 1996, Congress overwhelmingly repealed cable price regulation.

CABLE-RELATED, IN-KIND CONTRIBUTIONS SHOULD BE LIMITED

The court in *Montgomery County* found that the term "franchise fee" can include in-kind contributions, although it doesn't necessarily include *every* in-kind contribution. The court concluded that the Commission failed to offer any explanation as to why the statute allows it to treat *cable-related* (as opposed to all) in-kind exactions as franchise fees—in-kind contributions *unrelated* to the provision of cable services are therefore no longer at issue.

In clarifying which in-kind contributions count as franchise fees subject to a five percent cap of a cable operator's gross revenues, the Commission strikes the right balance. In-kind contributions that are problematic and would be counted toward the cap would include traffic light control systems and requirements for free or discounted cable service. Incidental costs necessary to enforce the franchise would not count—nor would any tax, fee, or assessment of *general applicability.*

[1] Patrick R. Parsons, Blue Skies: A History of Cable Television (2008).

In terms of whether the statute allows this, as the Commission has noted, the term "franchise fee" in the statute covers "any kind" of tax, fee, or assessment. It does not distinguish between whether it is related or unrelated to the provision of cable service. Nor does the legislative history.

Counting problematic in-kind contributions towards the five percent cap is necessary, as the Commission observes, because otherwise LFAs could circumvent the cap. An exception for in-kind contributions is an exception that could swallow the rule (that cable operators should contribute no more than five percent of their gross revenues).

The Municipal Organizations argue that unlimited in-kind contributions do not harm cable operators because the statute allows for recovery from subscribers of the costs of franchise requirements, and that the Commission's proposal would result in a windfall to cable operators since they be allowed to deduct from franchise fees the fair market value of requirements that have already been paid for by subscribers.[2] This argument makes several unwarranted assumptions, such as that consumers are not price-sensitive, the market for video services is not competitive where consumers cannot cut the cord and take their business elsewhere and that cable operators are under no competitive pressure to offer the best value for money.

NON-CABLE SERVICES SHOULD NOT BE REGULATED THE SAME AS CABLE SERVICES ON MIXED-USE NETWORKS

The Commission is on sound footing in wanting to ensure that LFAs do not use their video franchising authority to regulate most non-cable services offered over cable systems (or the facilities and equipment used in the provision of such services) by incumbent cable operators. Non-cable services include telecommunications and information services—such as broadband Internet access services, and private carrier services, such as certain types of business data services—which Congress has seen fit to regulate (or not regulate) under other provisions of the Communications Act. Allowing LFAs to regulate

[2] *Comments of the National Association of Telecommunications Officers and Advisors (NATOA) et al. ("Municipal Organizations")* at 11.

telecommunications and information services, as the Commission observes, would lead to inconsistent, patchwork regulation and could undermine Congressional policy of preserving the "vibrant and competitive free market" that presently exists for the Internet and other interactive computer services, *unfettered by regulation*.[3]

So far, the Sixth Circuit has upheld the mixed-use rule only as applied to new entrants and incumbent cable operator that are also common carriers—but not to incumbent cable operators that are not also common carriers. Not doing so could subject these cable operators to an unwarranted competitive disadvantage as or when they offer non-cable services. For example, what if LFAs attempt to require a subset of cable operators to pay franchise fees in connection with their provision of broadband Internet access or other information services?

Consumption of telecommunications and information services is highly price sensitive, and the Commission is on the right track with it's "light-touch" information service framework that it has previously found necessary to promote investment and innovation. Researcher Andrew Odlyzko has found that,

> There are repeating patterns in the histories of communication technologies, including ordinary mail, the telegraph, the telephone, and the Internet. In particular, the typical story for each service is that quality rises, prices decrease, and usage increases to produce increased total revenues.[4]

Information service providers have a natural, profit-making incentive to improve the services they offer and reduce the prices they charge consumers. Franchise fees and onerous regulation would raise the cost of providing service and reduce demand.

CONCLUSION

Consumers benefit from competitive markets, and the Commission's proposals in the Second Further Notice of Proposed Rulemaking in this proceeding are urgently needed to promote regulatory

[3] 47 U.S.C. 230.
[4] Odlyzko, Andrew, The History of Communications and its Implications for the Internet. Available at SSRN: https://ssrn.com/abstract=235284 or http://dx.doi.org/10.2139/ssrn.235284

parity in order to ensure that all competitors have a full and fair opportunity to compete from a regulatory perspective.

Respectfully submitted,

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